

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kenneth Steven Daywitt et al.,

Civil No. 16-648 (WMW/FLN)

Plaintiffs,

v.

Minnesota Department of
Human Services et al.,

**ORDER AND
REPORT AND
RECOMMENDATION**

Defendants.

Kenneth Daywitt and Kenneth Parks, *pro se*, for Plaintiffs.
Eric Brown, Assistant Attorney General, for Defendants.

THIS MATTER came before the undersigned United States Magistrate Judge on Plaintiffs Kenneth Steven Daywitt and Kenneth Gernard Park's motions for leave to amend their complaint (ECF No. 25) and for the action to continue (ECF No. 21), and Defendants' motion to dismiss (ECF No. 12). This matter was referred to the undersigned for Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule 72.1. Plaintiffs' motion to continue was filed simultaneously with Plaintiffs' memorandum in opposition to Defendants' motion to dismiss. The Court will treat them collectively as Plaintiffs' response to Defendants' motion to dismiss. For the reasons set forth below, Plaintiffs' motion to amend the complaint is **GRANTED**. The Court also recommends that Defendants' motion to dismiss and Plaintiffs' self-stylized motion "for the action to continue," be **DENIED as moot**.

Kenneth Daywitt and Kenneth Parks are civilly committed detainees at the Minnesota Sex Offender Program ("MSOP"). Compl., ECF No. 1. They filed this 42 U.S.C. § 1983 action on March 14, 2016, claiming that the denial of their request to be roommates violated their Equal Protection

rights as well as their rights under Title II of the Civil Rights Act of 1964 and the Minnesota Human Rights Act. *Id.* ¶ 1. Plaintiffs brought suit seeking monetary and injunctive relief against MSOP, the Minnesota Department of Human Services, and three MSOP state employees in their official and individual capacities. *Id.* ¶¶ 7–10, 48–72.

On July 14, 2016, Defendants filed a motion to dismiss (ECF No. 12). On August 10, 2016, Plaintiffs simultaneously filed a self-stylized motion “for Plaintiffs’ action to continue” and a memorandum in opposition to Defendants’ motion to dismiss. ECF Nos. 21; 22. On October 14, 2016, Plaintiffs’ filed a motion for leave to file a first amended complaint (ECF No. 25). Counsel for the Defendants advised the Court’s staff that they do not oppose Plaintiffs’ motion to amend but are likely to file a new motion to dismiss the amended complaint.¹ *See Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002) (holding that the plaintiff’s filing of an amended complaint rendered the defendants’ motion to dismiss the original complaint moot)).

Based on the foregoing, and all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiffs’ motion for leave to amend their complaint (ECF No. 25) is **GRANTED**. **IT IS HEREBY RECOMMENDED** that Defendants’ motion to dismiss (ECF No. 12) and Plaintiffs’ self-stylized “motion for Plaintiffs’ action to continue” (ECF No. 21) be **DENIED as moot**.

DATED: November 4, 2016

s/Franklin L. Noel
FRANKLIN L. NOEL
United States Magistrate Judge

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Defendants filed a renewed motion to dismiss Plaintiffs’ First Amended Complaint on October 28, 2016. *See* Mot. to Dismiss, ECF No. 29.

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), “a party may file and serve specific written objections to a magistrate judge’s proposed finding and recommendations within 14 days after being served a copy” of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set for in LR 72.2(c).

Under Advisement Date: This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after the objections are filed; or (2) from the date a timely response is filed.